EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

86-1060

April 1, 1986

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO:

Department of Commerce - Joyce Smith (377-4264)
Department of Defense - Werner Windus (697-1305)
Central Intelligence Agency
National Security Council

SUBJECT: Department of Justice and National Security Agency views letters on H.R. 3378 -- To amend the Omnibus Crime Control and Safe Streets Act of 1968.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than April 8, 1986.

Direct your questions to Gregory Jones (395-3454), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: David Reed
Sheri Alpert
Karen Wilson
John Cooney
Arnold Donahue

STAT

MEMO TO:

FROM: Sidra - OMB offices

SUBJECT: DoJ and NSA Viewsletter on H.R. 3378
(Page 1 of the legislative memorandum was missing from original action sent to us.)

Below is that part of the legislative memorandum that was missing from the original Action.

Ltr. addressed to Congressman Kastenmeier as follows:

Kastenmeier

Dear Mr. Chairman:

This letter is designed to augment Department of Justice's March 5, 1986, testimony before the Subcommittee on COURTS, CIVIL LIBERTIES, and the ADMINISTRATION OF JUSTICE with regard to H.R. 3378, the Electronic Communications Privacy Act. At that hearing, Congressman Moorehead asked the Department's representative, Deputy Assistant Attorney General, James Knapp, to reconsider the position set forth in the department's written Statement with respect to the private interception of cellular telephone communications. As you may recall, the Statement indicated that, although the department was prepared to "accept legislation that ... would require Title III authorization for law enforcement officers to intercept either the wire or radio transmission portion of cellular communications", citizen scanning for recreational purposes should not incur liability for interception alone but rather -- by analogy to the Communications Act of 1934 -- only where the citizen "both intercepts and divulges the communication under circumstances in which the interception and divulsions are illegal, tortious, or for commercial gain." Mr. Knapp stated at the hearing that this aspect of the department's written submission would be reconsidered and that the department would make a final recommendation to the Subcommittee after meeting with various interested parties over the next few weeks.

This letter will serve to advise the Subcommittee of the results of our reconsideration of the cellular private.

(Pick up on page 2.)

interception issue, as well as to suggest some additional ideas relating to the legislation before the Subcommittee.

As promised, the Department of Justice since March 5 has held a series of discussions with representatives of the cellular telephone industry as well as the manufacturers of scanners and other interested persons or groups. These meetings were frank and probing and contributed significantly to our understanding of the issues. The question at issue with regard to whether the unauthorized private interception of cellular telephone communications should be criminalized is a difficult one for the Department inasmuch as it involves problems both of assessing the extent of privacy intrusion inherent in such interception as well as problems of enforcement of any prohibition. In this latter regard, Congress should be under no illusion, if offenses in this area are created, that the Department, under present budgetary constraints, will be able to devote substantial resources to the investigation of such offenses, or, because of the inherent difficulty of such investigations, that a substantial number of successful prosecutions would be brought.

Nevertheless, with those caveats, the Department has concluded that its originally stated position with regard to the private interception of cellular telephone conversations should be modified. Because we believe that persons' conversations over cellular telephones should enjoy the protections of federal law, as they do today if carried in part over wire, we are prepared to support legislation that would amend Title III's definitional provisions as to specifically cover the radio component of

cellular communications. This would clearly bring communications over cellular telephones within the ambit of Title III.

However, our consideration of this issue has also led us to reevaluate the present penalty structure of Title III, which as you know in section 2511(1)(a) makes any willful interception of a wire or oral communication a five-year felony. In our judgment, this penalty, for a first and unaggravated offense of simple interception, is too severe. [1] We think fairness and enforcement would be enhanced if a first offense of simple interception were to be a misdemeanor or petty offense. The existing felony penalties would continue to apply for interception accompanied by divulgence or use for a tortious, illegal, or commercial purpose, as well as for a second or subsequent simple interception offense. In our view, criminalization of the private interception of cellular communications (which would require proof that the defendant was aware that the communication being intercepted was of a protected kind and not, for example, a conversation over a cordless telephone), coupled with the above- suggested refinements in the penalty structure for Title III interception violations, represents the most appropriate balancing of the competing interests in this complex field.

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[1] Our comment is confined to subsection (1)(a) and is not intended to suggest changing the applicable penalties for offenses under subsections (1)(b),(c), or (d).

We also recommend consideration by the Subcommittee of an injunction provision as an additional form of remedy for prospective or ongoing breaches of Title III. As part of the Comprehensive Crime Control Act of 1984, Congress enacted 18 U.S.C. 1345, which for the first time permits the United States to obtain an injunction against fraudulent practices under the wire, mail, and bank fraud statutes. In our view, a similar injunction provision in the context of Title III would be useful, either pending prosecution or in a suitable instance as an alternative thereto, as a mechanism for curtailing ongoing practices that threaten the privacy interests protected by that statute.

The Department appreciates the opportunity to provide you with our views on this important matter and we look forward to working with you and the Subcommittee staff in the development of appropriate legislation.

Sincerely,

Bolton